

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

ALEXUS MURPHY, MARKITTA
WITCHER, and DIANE HANES,
individually and on behalf of others
similarly situated,

Plaintiffs,

v.

ACTIVE INTEREST MEDIA, INC.,

Defendant.

Case No. 2:22-cv-12159
Hon. David M. Lawson

**DEFENDANT ACTIVE INTEREST MEDIA, INC'S
MOTION FOR LEAVE TO FILE RESPONSE
TO NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendant Active Interest Media, Inc. ("AIM") respectfully moves the Court for leave to file a response to Plaintiffs' Notice of Supplemental Authority (the "Notice"), filed March 31, 2023 (ECF No. 33).

1. In their Notice, Plaintiffs enclosed, mischaracterized, and made implicit arguments based on *Batts v. Gannett Co.*, Case No. 4:22-cv-10685, ECF No. 28 (E.D. Mich. Mar. 30, 2023).

2. In view of Plaintiffs' misstatements and arguments, Defendant respectfully seeks leave to submit a response to Plaintiffs' Notice. The proposed Response to Notice of Supplemental Authority is attached hereto as Exhibit A.

3. Pursuant to Local Rule 7.1(a), Defendant's counsel certifies that on April 12, 2023, they communicated with Plaintiffs' counsel, explaining the nature of the relief sought in this Motion and seeking concurrence in that relief. Plaintiffs' counsel stated that Plaintiffs would not oppose a three-to-five-page response to the Notice.

Dated: April 14, 2023

Respectfully submitted,

/s/ Kristen C. Rodriguez

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Active Interest Media, Inc.

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Case No. 2:22-cv-12159
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**BRIEF IN SUPPORT OF DEFENDANT ACTIVE INTEREST MEDIA'S
MOTION FOR LEAVE TO FILE RESPONSE
TO NOTICE OF SUPPLEMENTAL AUTHORITY**

STATEMENT OF ISSUES PRESENTED

1. Whether Active Interest Media, Inc. should be granted leave to file a response to Plaintiffs' misstatements and arguments in their Notice of Supplemental Authority?

Defendant's Answer: YES.

STATEMENT OF CONTROLLING/MOST APPROPRIATE AUTHORITY

The controlling and most appropriate authority for this Motion includes:

1. *United States v. Van*, No. 06-20491, 2021 WL 4962139 (E.D. Mich. Oct. 26, 2021).
2. *Tokarczyk v. A.G. Edwards & Sons, Inc.*, No. 08-12481, 2009 WL 1025392 (E.D. Mich. Apr. 15, 2009).
3. *Batts v. Gannett Co.*, Case No. 4:22-cv-10685, ECF No. 28 (E.D. Mich. Mar. 30, 2023).

Defendant Active Interest Media, Inc. (“AIM”) respectfully seeks leave to submit a response to Plaintiffs’ Notice of Supplemental Authority (the “Notice”), filed March 31, 2023 (ECF No. 33).

ARGUMENT

In their Notice, Plaintiffs enclosed, misstated, and made implicit arguments on *Batts v. Gannett Co.*, No. 4:22-cv-10685, ECF No. 28 (E.D. Mich. Mar. 30, 2023). Plaintiffs wrongly stated or implied that: (1) the court in *Batts* had ruled or considered whether plaintiffs in *Batts* had adequately pled disclosure under Rule 12(b)(6) and further, that that court had considered *Nashel v. New York Times Co.*, No. 2:22-cv-10633, 2022 WL 6775657 (E.D. Mich. Oct. 11, 2022) in doing so; (2) the *Batts* defendant had made the same arguments on Article III standing as AIM did in its motion to dismiss; and (3) the court had considered arguments on COVID-19 tolling and had further considered arguments on the effect of such tolling on absent class members and the date range applicable to the putative class.

In view of Plaintiffs’ misstatements and arguments, which would provide Plaintiffs with an unfair advantage if left unanswered, Defendant respectfully seeks leave to submit a response to Plaintiffs’ Notice. *See, e.g., Tokarczyk v. A.G. Edwards & Sons, Inc.*, No. 08-12481, 2009 WL 1025392, at *1 n.1 (E.D. Mich. Apr. 15, 2009) (denying a motion to strike a response and notice of supplemental authority but granting the opportunity to file a supplemental pleading to address newly raised

arguments and caselaw); *United States v. Van*, No. 06-20491, 2021 WL 4962139, at *2 (E.D. Mich. Oct. 26, 2021) (allowing defendant to file a response to a notice of supplemental authority concerning an opinion entered after briefing to argue new opinion was wrongly decided); *Smith v. Stellar Recovery, Inc.*, No. 15-cv-11717, 2017 WL 1336075, at *8 (E.D. Mich. Feb. 7, 2017) (allowing defendant to respond to plaintiff's notice of supplemental authority). The proposed Response to Notice of Supplemental Authority is attached hereto as Exhibit A.

CONCLUSION

For the foregoing reasons, AIM respectfully requests that it be granted leave to file a response to Plaintiffs' Notice of Supplemental Authority.

Dated: April 14, 2023

Respectfully submitted,

/s/ Kristen C. Rodriguez

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Certificate of Service

I hereby certify that on April 14, 2023, a copy of the foregoing document was filed electronically and served by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

/s/ Kristen C. Rodriguez
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